Nos. 77-1613 and 77-1727

In the Supreme Court of the United States

OCTOBER TERM, 1977

EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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INDEX

CITATIONS

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-4)[1] is reported at 571 F. 2d 784. The opinion of the Interstate Commerce Commission (Pet. App. C-1 to C-18)

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[1]"Pet. App." refers to the separately bound appendix in No. 77-1613.

is reported at 119 M.C.C. 691. The opinion of the Commission on reconsideration (Pet. App. D-1 to D-29) is reported at 126 M.C.C. 303.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1978. A petition for rehearing was denied on March 30, 1978. The petitions for a writ of certiorari were filed on May 11, 1978, and May 18, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 2350 and 1254(1).

QUESTION PRESENTED

Whether the Interstate Commerce Commission exceeded its authority by requiring motor carriers to eliminate from their tariffs certain provisions denying shippers the benefit of joint rates on cargo shipped by more than two carriers over through routes.

STATEMENT

The Interstate Commerce Commisssion determined that certain tariff provisions limiting the application of joint rates to cargo shipped by no more than two carriers over through routes[2] conflicted with a Commission regulation (49 C.F.R. 1307.27(k)(1) (1974)) which provides that no carrier shall publish a tariff "which results in

[2]A "through route" is "an arrangement, express or implied, between connecting [carriers] for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another." *Thompson* v. *United States*, 343 U.S. 549, 556. A "joint rate" is "a combined charge for the entire journey of a shipment of cargo over the lines of several carriers from origin to destination. * * * Generally speaking, joint rates for a shipment are cheaper than the sum of the local rates." *McLean Trucking Co.* v. *United States*, 346 F. Supp. 349, 351 (M.D. N.C.), affirmed, 409 U.S. 1121. Joint rates are not always available even though carriers offer through route services. *Thompson* v. *United States*, *supra*, 343 U.S. at 556.

restricting service to less than the carrier's full operating authority." The substance of the Commission's order is that motor carriers must eliminate outstanding tariff restrictions that provide that joint rates are inapplicable to operations involving more than two carriers, and that carriers must allow shippers the benefit of less expensive joint rates when their cargo is transported by no more than three carriers over through routes.

The Commission found that tariff provisions confining joint rates to two-carrier operations had caused serious deficiencies in service to rural areas (Pet. App. D-9 to D-10, D-18 to D-20). The Commission determined that the two-carrier limitation has had an "embargo effect" on traffic in certain areas because rural shippers, denied the benefit of lower joint rates, have found transportation expenses to be prohibitively high.[3] The Commission also determined that, if shippers could obtain transportation services from three carriers operating over a through route at the relatively lower joint rate, adequate service could be provided for shippers in all geographical areas, without substantial cost increases for the carriers (Pet. App. D-20). And the Commission indicated that, to the extent that cost increases were experienced by the carriers, rates could be increased (*ibid.*). Accordingly, the Commission ordered motor carriers to eliminate two-carrier restrictions from their tariffs.

[3]Under the two-carrier limitation, if three or more carriers were required to complete a particular shipment, either a joint rate plus a local rate or the much higher local rates of all participating carriers were applicable. Shippers in rural areas frequently depended upon interconnections between three separate carriers to complete their shipments, and thus were exposed to substantially higher transportation costs.

The Commission emphasized that it was not compelling carriers to establish "through routes" that would not otherwise exist. The Commission acknowledged that it does not have authority to "force motor carriers to enter into interline arrangements," and that carriers were "free to choose whether or not to initiate interline service" (Pet. App. D-15). However, "to the extent [that] these carriers hold out through route availability," the Commission determined that they could not adopt unreasonable limitations on the availability of joint rates which resulted in a virtual embargo of transportation for shippers in isolated areas (Pet. App. D-23 to D-24). The Commission concluded that "by filing a joint line tariff, each carrier accepts the right of the Commission to prescribe the proper parameters of the tariff publication. * * * We hold, therefore, that the Commission has power to impose reasonable conditions on the services offered by carriers who choose to exercise their right to engage in interline operations" (Pet. App. D-16).[4]

On a petition to review the order of the Commission, the court of appeals held that the Commission's order is a proper exercise of its statutory authority, and that its administrative discretion had not been abused (Pet. App. A-1 to A-4).

ARGUMENT

The decision of the court below is correct, and it does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

[4]The Commission thus recognized that carriers that publish joint line tariffs and routing guides setting forth the points between which such carriers hold themselves out to provide service, including the points at which they interchange with other carriers, have established, in the words of petitioners here (see Pet. No. 77-1613, p. 3), "a nationwide network of through route service * * *".

1. In disapproving the two-carrier limitation in joint line tariffs, the Commission exercised its broad authority under Sections 208(a), 204(a)(1), and 204(a)(6) of the Interstate Commerce Act, as added, 49 Stat. 552, 546, and amended, 49 U.S.C. 308(a), 304(a)(1) and 304(a)(6). The Commission may regulate common motor carriers and "establish reasonable requirements with respect to continuous and adequate service" (49 U.S.C. 304(a)(1)). The Commission enjoys ancillary power to make "all necessary orders" and to adopt "rules, regulations and procedure[s]" to implement its regulatory authority (49 U.S.C. 304(a)(6)).[5] And the Commission is further empowered to attach to each certificate of public convenience and necessity granted to a motor carrier "such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require" (49 U.S.C. 308(a)(1)). Those powers are to be exercised by the Commission "to promote safe, adequate, economical, and efficient service * * *", as specified in the National Transportation Policy, 54 Stat. 899, preceding 49 U.S.C. 1.[6]

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[5]Regulations based on permissible public interest goals fall within the general rule-making authority of an administrative agency so long as they are a reasonable means to achieve such goals. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369. See also, *Federal Communications Commission* v. *National Citizens Committee for Broadcasting*, No. 76-1471, decided June 12, 1978, slip op. 19.

[6]As this Court noted in *American Trucking Associations, Inc.* v. *Atchison, Topeka & Santa Fe Ry., Co.*, 387 U.S. 397, 421, the declaration of national transportation policy governs the Commission in its administration and enforcement of all provisions of the Act and is " 'the yardstick by which the correctness of the Commission's actions will be measured.' "

The disapproval of the two-carrier limitation, found by the Commission to result in less than adequate service to certain classes of shippers, was a proper exercise of the discretionary powers granted to the Commission by Congress. The court of appeals therefore properly enforced the Commission's order. See *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 748-749:

> The standard of judicial review for actions of the Interstate Commerce Commission * * * is well established by the prior decisions of this Court. We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported.

2. Petitioners contend (Pet. No. 77-1613, pp. 5-9; Pet. No. 77-1727, pp. 10-17) that the action of the Commission is prohibited by Section 216(c) of the Interstate Commerce Act, as added, 49 Stat. 558, and amended, 49 U.S.C. 316(c). That section provides that motor carriers "may establish reasonable through routes and joint rates * * * with other such carriers * * * and just and reasonable regulations and practices in connection therewith." Petitioners contend that this provision grants them discretion to establish through routes and joint rates as they see fit, and that the Commission cannot "construct" routes that the carriers have not themselves initiated.

The Commission recognized, however, that it does not have authority to compel carriers to establish through routes (Pet. App. D-15). The Commission nonetheless determined that where, as here, the carriers have

established interline operations, and have held themselves out to shippers as providing such through services, their operations over these established routes are subject to reasonable terms and conditions as prescribed by the Commission in the public interest (Pet. App. D-14 to D-24). See *McLean Trucking Co.* v. *United States*, 346 F. Supp. 349 (M.D. N.C.), affirmed, 409 U.S. 1121.[7]

Petitioners also argue that *Thompson* v. *United States*, 343 U.S. 549, is inconsistent with the action of the Commission here. The facts in *Thompson*, however, were quite different from those presented here. In *Thompson* the issue was whether a through route of any kind existed. This Court held that no through route existed because the carriers did not "hold themselves out as offering through transportation service" and did not enter into any such "course of business." The Court noted that "[t]hrough routes * * * ordinarily are, established by the voluntary action of connecting carriers" and that through carriage "implies the existence of a through route whatever the form of the rates charged for the through service." 343 U.S. at 554, 557. Here, as the Commission explicitly found, the carriers did voluntarily enter into through carriage *service* and held themselves out as providing such service (even though joint *rates* were offered only on a limited, two-carrier basis). That finding

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[7]Petitioners do not dispute the authority of the Commission to regulate transportation on through routes (see Pet. No. 77-1613, pp. 8-9; Pet. No. 77-1727, p. 12). Thus, the findings of the Commission (which were affirmed on appeal) that through routes had been established because, *inter alia*, the tariffs filed by petitioners and their related routing guides set forth through route services, should not be subject to further review in this Court. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636; *United States* v. *Allegheny-Ludlum Steel Corp.*, *supra*, 406 U.S. at 748-749.

was adopted by the court of appeals.[8] Petitioners simply disregard the distinction between through service and through rates. *Thompson* involved only a through service problem; the present case concerns the rates to be charged for established through services. See also *Associated Truck Lines, Inc.* v. *United States*, 304 F. Supp. 1094 (W.D. Mich.), affirmed, 397 U.S. 42; *McLean Trucking Co.* v. *United States, supra*, both of which upheld the Commission's regulation of unreasonable practices that had impeded carriage over through routes. As this Court explained in *American Trucking Associations, Inc.* v. *Atchison, Topeka & Santa Fe Ry., Co.*, 387 U.S. 397, 410-411, in the course of holding that Section 216(c) of the Act is not a bar to a Commission order similar to that involved here:

> [W]e cannot accept arguments based upon arguable inferences from nonspecific statutory language * * *. For example, §216(c), 49 U.S.C. §316(c), authorizes the railroads to enter into voluntary arrangements for through routes and joint rates with motor carriers. There is no Commision power to compel the railroads to do so, and it is argued that from this we should derive a congressional intent that the ICC may not compel the railroads to furnish services to the motor carriers in any circumstances. There is no basis for this vast leap from a particular authorization to a pervasive prohibition [of ICC regulation].

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[8]Petitioners argue (Pet. No. 77-1613, p. 6) that appellate counsel for the Commission advanced certain illustrative contentions in oral argument on appeal which were equivalent to the "construction" by counsel of through routes. But the findings and conclusions of the Commission, not the arguments of counsel, are the subjects of appellate review (*Federal Trade Commission* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 246-250), and the findings and conclusions of the Commission regarding the existence of through routes in actual operation here were sufficient to support its determination.

3. Petitioners contend that the limitation of joint rates to transportation by only two carriers is reasonable and should have been approved by the Commission (Pet. No. 77-1613, p. 10). But the Commission specifically found that the two-carrier limitation worked a serious hardship on shippers in isolated areas and that three carriers were needed to afford adequate service and efficient movement of their cargo (Pet. App. D-20). These factual inferences, drawn by the agency after a full hearing and affirmed by the court of appeals, were within the Commission's authority and are not arbitrary or capricious. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, No. 76-419, decided April 3, 1978, slip op. 36.

Petitioners also argue that through services, provided by three carriers at joint rates, may give rise to increased costs (Pet. No. 77-1613, p. 10). But the Commission found that any cost increase would be insignificant, and that the carriers, subject to Commission approval, might seek rate increases to recover increased operating expenses (Pet. App. D-20).

Finally, petitioners argue (Pet. No. 77-1613, p. 10) that the Commission's three-carrier requirement will force carriers to share liability for lost and damaged goods with other carriers who are of "unknown or questionable responsibility." The matter of interconnection with financially unsound carriers is the subject of a different tariff provision, which the Commission has determined may be acceptable when reviewed in the future on a case-by-case basis (Pet. App. D-21 to D-22). The order here does not purport to determine the general propriety of tariff provisions intended to assure the financial responsibility of interconnecting carriers, and petitioners' objection therefore is groundless.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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